FOR ARGUMENT

Supreme Court, U.S.
FILED
SEP 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-567

# In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

*v.*

EUGENE DiFRANCESCO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

Page

Cases:


*Green* v. *United States*, 355 U.S. 184 ..... 7

*Rex* v. *Bourne*, 7 Ad. & E. 58, 112 Eng. Rep. 393 ..... 7

*Rex* v. *Fletcher*, 1 R. & R.C.C.R. 58, 168 Eng. Rep. 682 ..... 7

*Rex* v. *Price*, 6 East 323, 102 Eng. Rep. 1310 ..... 7

*Rex* v. *Walcot*, 4 Mod. 396, 87 Eng. Rep. 464 ..... 7

*Rex* v. *Walcot*, 90 Eng. Rep. 533 ..... 7

*United States* v. *Allison*, 555 F. 2d 1385 ..... 4

*United States* v. *Burroughs*, 537 F. 2d 1156 ..... 4

*United States* v. *Cahalane*, 560 F. 2d 601, cert. denied, 434 U.S. 1045 ..... 4

*United States* v. *Calloway*, 562 F. 2d 615 ..... 4

*United States* v. *Ceccolini*, 435 U.S. 268 ..... 3-4

*United States* v. *Cravero*, 530 F. 2d 666 ..... 4

*United States* v. *De Garces*, 518 F. 2d 1156 ..... 4

*United States* v. *Donahue*, 539 F. 2d 1131 ..... 4

Page

Cases—Continued:

*United States* v. *Forcellati*, 610 F. 2d 25, cert. denied, No. 79-5945 (Mar. 24, 1980) ..... 4

*United States* v. *Grayson*, 438 U.S. 41 ..... 6

*United States* v. *Ilacqua*, 562 F. 2d 399, cert. denied, 435 U.S. 917 ..... 2

*United States* v. *Jones*, 580 F. 2d 219 ..... 4

*United States* v. *Rojas*, 554 F. 2d 938 ..... 4

*United States* v. *Wilson*, 420 U.S. 332 ..... 3, 5, 6

*Williams* v. *New York*, 337 U.S. 241 ..... 6

Constitution and statutes:

Fifth Amendment, Double Jeopardy Clause ..... 1, 2, 3, 4, 5

18 U.S.C. 3575 ..... 1, 2

18 U.S.C. 3576 ..... 1, 2, 4

Miscellaneous:

*Harris's Criminal Law* (22d ed. 1973) ..... 6

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) ..... 2

Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences,* 18 Am. Crim. L. Rev. 51 (1980) ..... 6

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-567

UNITED STATES OF AMERICA, PETITIONER

*v.*

EUGENE DiFRANCESCO

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## REPLY BRIEF FOR THE UNITED STATES

---

1. Respondent contends (Br. 6-9, 14) that, apart from constitutional considerations, the government's appeal should be dismissed because respondent does not qualify as a dangerous special offender under 18 U.S.C. 3575. That issue is not before this Court. There can be no doubt that the district court found respondent to be a "dangerous special offender" (A. 35), although the sentence it imposed is inconsistent with that finding. Whether that determination was erroneous is a question that the court of appeals may consider if it takes jurisdiction of the government's appeal. The only question before this Court is whether the court of appeals erred in holding that it lacked jurisdiction to hear the government's appeal on the ground that 18 U.S.C. 3576 violates the Double Jeopardy Clause.

In any event, respondent's objections are without substance. To be sure, the court's lenient sentence is at odds with its finding that respondent was a "dangerous" offender under 18 U.S.C. 3575.[1] That is the basis for the government's appeal. But that fact does not eliminate the constitutional question in this case. Even assuming that, as respondent asserts, the district court's sentence should be construed as a ruling that respondent was not a dangerous special offender, the sentence would still be appealable under Section 3576. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 166 (1969); *United States* v. *Ilacqua*, 562 F. 2d 399, 402 (6th Cir. 1977), cert. denied, 435 U.S. 917 (1978). The court of appeals would have to consider whether respondent should have been sentenced as a "dangerous special

---

[1]Contrary to respondent's suggestion (Br. 7, 11-12), Judge Pratt did not sentence respondent at his bombing trial to a term below the maximum because he believed that respondent was not dangerous. Along the lines of Judge Burke's later written findings at the dangerous special offender hearing, Judge Pratt clearly indicated at the sentencing hearing of March 17, 1978, that he felt respondent was a dangerous criminal (Tr. 18-19):

> [Respondent's offenses] are among the most serious violations of the law recognized by the legal system. * * * He has continued in a pattern of criminal activity in crimes which relate to extortion, assault, burglary, racketeering. I have searched the presentence report and listened carefully throughout the proceedings here this morning for some offsetting factors and have found very little. The history of the defendant appears to be that of defiant, antisocial conduct. His prior incarcerations have apparently failed to deter any further criminal behavior on the part of the defendant. He has given no indication or remorse, of desire or willingness to relinquish his criminal ways or of any respect or regard for his fellow man, for society, or for the law.

Judge Pratt explained that he imposed concurrent, rather than consecutive, sentences on the bombing counts only because they involved the "same combination of acts" (Tr. 20). He imposed an eight-year sentence on the bombing count, rather than the ten-year maximum, because he felt it was equitable to give respondent credit for time served on a state conviction that was set aside on appeal (*id.* at 21).

offender," and thus whether his sentence should be increased. The same question would still remain for this Court—whether a sentence imposed by the district court is imbued by the Constitution with a degree of finality such that Congress may not provide that it may be increased on appeal.

2. Amicus American Civil Liberties Union (ACLU) erroneously asserts (Br. 7, 37-40) that the fundamental prohibition of the Double Jeopardy Clause is that any readjudication of facts, except at the defendant's request, is forbidden. The primary basis given for this conclusion is the fact that *United States* v. *Wilson*, 420 U.S. 332 (1975), involved a correction of an error of law (Br. 23-24). We disagree with this proposition and its proposed application to the instant case on two counts: First, we think it plain that the Double Jeopardy Clause draws no absolute distinction between factual and legal questions; second, even assuming that it did, such a distinction would be irrelevant here because no readjudication of facts is required by the government's appeal in this case.

As discussed in our opening brief (at 18-24), the constitutional prohibition focuses upon the need for a retrial on the issue of guilt or innocence, not the degree to which the issue sought to be appealed is a factual one. Thus, when a jury returns a verdict of not guilty, the government is equally precluded from seeking review of legal errors as it is of factual ones. Moreover, while we are not quite sure what amicus means when it speaks of "readjudication of facts" (Br. 37), it is equally clear that the government may seek review of questions that require the appellate tribunal to undertake a searching inquiry into the factual record. This Court itself has reviewed a post-trial suppression ruling and reversed the suppression after weighing the facts and their legal consequences. *United States* v. *Ceccolini*, 435 U.S. 268

(1978). And every court of appeals to consider the question has held that the Double Jeopardy Clause permits the government to appeal from a post-guilty-verdict acquittal entered by a district court.[2] So long as retrial would not be required by the government's appeal, the question whether the appeal involves "factual" or "legal" issues has never been thought material.

Even assuming *arguendo* that the Constitution would bar a de novo sentencing hearing by the court of appeals, it is apparent that no such hearing is involved here. The statute provides that the sentence review is to be had "on the record of the sentencing court." The ACLU confuses (Br. 29, 40-41) this review of the record with a readjudication of facts decided below. In most appeals it is necessary for the reviewing court to examine the record, but no "readjudication" of facts is thereby involved.[3] Although the ACLU characterizes (Br. 41) review under Section 3576 as "*ab initio*, * * * wholly without regard to * * * the trial court's action," the statute does not contemplate a de novo factual determination by the court of appeals based on the record below. The scope of review is quite narrow; the

---

[2]See, *e.g.*, *United States* v. *Forcellati*, 610 F. 2d 25 (1st Cir. 1979), cert. denied, No. 79-5945 (Mar. 24, 1980); *United States* v. *De Garces*, 518 F. 2d 1156 (2d Cir. 1975); *United States* v. *Cahalane*, 560 F. 2d 601, 603 n.2 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1980); *United States* v. *Burroughs*, 537 F. 2d 1156 (4th Cir. 1976); *United States* v. *Cravero*, 530 F. 2d 666 (5th Cir. 1976); *United States* v. *Jones*, 580 F. 2d 219, 221-222 n.3 (6th Cir. 1978); *United States* v. *Allison*, 555 F. 2d 1385 (7th Cir. 1977); *United States* v. *Donahue*, 539 F. 2d 1131 (8th Cir. 1976); *United States* v. *Rojas*, 554 F. 2d 938 (9th Cir. 1977); *United States* v. *Calloway*, 562 F. 2d 615 (10th Cir. 1977).

[3]The ACLU notes (Br. 30, 41) that a "hearing" is required before the court of appeals may increase the defendant's sentence. We think it clear from the statute, however, that this language does not provide for a duplication of the sentencing hearing held in the district court, but rather constitutes a requirement that the defendant be afforded an opportunity to be heard through counsel in oral argument, as in most appeals.

statute provides that the court of appeals should review whether "the findings made were clearly erroneous, or the sentencing court's discretion was abused."

Finally, it must be noted that, in this case, the government did not challenge the district court's factual findings in any way. We fully accept them and raised on appeal only the question of the proper legal consequences to be attached to those facts. Thus, the appeal in this case, held unconstitutional by the court of appeals, does not even involve the narrow review of the district court's factual findings authorized by the statute, but only the legal question of abuse of discretion by the trial court in imposing sentence.

3. The ACLU also takes issue (Br. 43-45) with our argument (Br. 33-42) that trial and sentencing are significantly different for double jeopardy purposes, so that a statute authorizing review and redetermination of a sentence would not offend the Constitution even though one authorizing a retrial after review of an acquittal would. While we do not for one moment question the importance to a defendant of the sentence imposed upon him after conviction, amicus' arguments are unconvincing because they wholly fail to come to grips with the necessary implications of *Wilson*.

Whatever else may be said about a defendant's interest in retaining the benefits of a lenient sentence, that interest cannot exceed the interest of a defendant (such as Wilson) in retaining the benefits of an acquittal or a dismissal of the charges against him. Yet *Wilson* and its progeny (see note 2, *supra*) clearly settle that the Double Jeopardy Clause does not protect such interests except where the government's appeal would require a new trial. Indeed, *Wilson* implicitly confirms that trial and sentencing are wholly different matters for double jeopardy purposes, since

the government appeal that it permits would, if successful, have as one of its consequences the sentencing of the defendant, with all the ordeal and expense that that entails. If sentencing and trial were part of a unitary whole for double jeopardy purposes, then the recognition in *Wilson* that further trial proceedings are barred would presumably have precluded sentencing proceedings as well.

It is equally settled by *Wilson* and other cases authorizing government appeals in the face of double jeopardy objections that the ordeal and expense inherent in defending against the appeal itself is not material to the double jeopardy analysis. Here, as in those cases, the appeal entails the presentation of briefs and argument by counsel in an appellate court, a proceeding wholly different in character from a trial. The defendant would ordinarily not even be present. Moreover, the potential public embarrassment and stigma associated with appellate proceedings is minimal when contrasted with that attending trials. See Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences,* 18 Am. Crim. L. Rev. 51, 67 (1980).

Finally, although it is not controlling of the double jeopardy issue, it is certainly relevant that the Court has recognized substantial distinctions between trial and sentencing for due process purposes. See *United States* v. *Grayson*, 438 U.S. 41 (1978); *Williams* v. *New York*, 337 U.S. 241 (1949).

4. The ACLU mistakenly claims (Br. 30-33) that the common law prohibited amending a sentence once it was imposed. Prior to 1907, no right of appeal existed in criminal cases in England. If review could be obtained, it was on a writ of error. See *Harris's Criminal Law* 840 (22d ed. 1973). Because of the nature of this procedure, the higher court's options were limited to denying the writ, thereby

leaving the judgment undisturbed, or granting it, thereby discharging the prisoner; the court could not alter the judgment below.[4] However, the trial court was free to amend a sentence at any time before the judgment was entered on the rolls at the end of the court's term, even in capital cases.[5] Thus, in *Rex* v. *Fletcher*, 1 R. & R.C.C.R. 58, 168 Eng. Rep. 682 (1803), although the judges were divided on the question whether the death sentence pronounced was defective (because it did not provide for dissection), all the judges agreed that the omission could have been remedied by the trial judge "as the sentence may be corrected or altered at any time during the assizes." *Id.* at 683. Accord, *Rex* v. *Price*, 6 East 323, 102 Eng. Rep. 1310 (1805).[6]

---

[4]See, *e.g.*, *Rex* v. *Bourne*, 7 Ad. & E. 58, 112 Eng. Rep. 393 (1837) (judgment reversed and prisoners discharged because they were sentenced to transportation for a crime punishable only by death).

[5]As noted in our opening brief (at 25-26), this function of the rolls of the court carried over into America. Thus, in addition to the section cited by the ACLU, the Massachusetts Body of Liberties also provided:

> Everie Action betweene partie and partie, and prceedings against delinquents in Criminall causes shall be briefly and destinctly entered on the Rolles of every Court by the Recorder thereof. That such actions be not *afterwards* brought againe to the vexation of any man.

*Green* v. *United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting), quoting Colonial Laws of Massachusetts 47 (emphasis added).

[6]*Rex* v. *Walcot*, 90 Eng. Rep. 533 (1694), cited by Amicus ACLU (Br. 32 n.4), is not to the contrary. A more complete report of that case at 4 Mod. 396, 87 Eng. Rep. 464 (1694), reveals that it involved a collateral attack by the son of Thomas Walcot, who had been executed for treason, seeking to reverse the forfeiture of his father's lands on the ground that the judgment of treason was technically invalid. The court did not hold that it could never order increase of a

## CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
*Solicitor General*

SEPTEMBER 1980

---

sentence after imposition, but instead recognized that that might be possible in certain circumstances. In the case before it, however, nothing could be done to "increase" the sentence because the collateral attack was brought in a different court from the one that had initially imposed the defective sentence.

DOJ-1980-09